Provisional

For participants only

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Provisional summary record of the 3420th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 4 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

The Chair invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of peremptory norms of general international law (*jus cogens*) (A/CN.4/714 and A/CN.4/714/Corr.1).

Mr. Cissé said that he wished to thank the Special Rapporteur for his excellent report, in which he addressed a complex topic in a manner that was easy to understand. Turning to the proposed draft conclusions, he said that the first sentence of draft conclusion 10 (1) was sufficient in describing clearly the title of the draft conclusion. The second sentence, meanwhile, was somewhat superfluous, as it went without saying that a treaty that was void did not create any rights or obligations for States, regardless of whether or not those States were parties.

Draft conclusion 10 (3) provided that "to avoid conflict with a peremptory norm of general international law, a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*)". The word "interpreted" was, in his view, inappropriate, since the purpose of the provision was to avoid any potential or actual conflict between a legal instrument being negotiated by the parties and a peremptory norm. A legal text was interpreted only once it had been adopted or was already in force. The aim of the paragraph, however, was to avoid conflict by ensuring that treaty provisions that were being finalized or adopted did not violate or clash with peremptory norms of international law. He therefore proposed that draft conclusion 10 (3) should read: "To avoid conflict with a peremptory norm of international law (*jus cogens*), a provision in a treaty that is being finalized or adopted should, as far as possible, be consistent with that norm." [*Pour éviter tout conflit avec une norme impérative du droit international (jus cogens), les dispositions conventionnelles en cours de conclusion ou d'adoption, doivent, autant que possible, être compatibles avec cette norme.*]

Draft conclusion 11 was generally satisfactory. The two paragraphs contained therein described and analysed clearly the issue at hand, namely the severability of treaty provisions in conflict with a peremptory norm. He did, however, have a reservation concerning paragraph 2 (c), which established that "continued performance of the remainder of the treaty would not be unjust". The provision lacked clarity and did little to aid the comprehension of the draft conclusion. Subparagraphs (a) and (b) were sufficiently clear and addressed the issues raised by the draft conclusion. Should subparagraph (c) be retained, its content should be explained in greater detail in the report. Alternatively, it could be deleted and its content dealt with in a more exhaustive manner in the commentary, where it would be appropriate to explain why continued performance of the remainder of the treaty would not be unjust and what was meant by "the remainder of the treaty".

Draft conclusion 14 (2), while relevant, left a degree of ambiguity about the requirement of consent by the parties for establishing the jurisdiction of the International Court of Justice. Indeed, it was not specified whose consent was needed. Did the requirement involve only the consent of States parties to a treaty? What of the consent of third States, bearing in mind the principle that compliance with peremptory norms was an obligation *erga omnes*? In any case, placing emphasis on the requirement of consent for establishing the jurisdiction of the Court and making it a prerequisite for that jurisdiction might contribute to rendering the violation of peremptory norms by a State non-justiciable by the Court, in the event that the former had not consented to establishing the jurisdiction of the latter to adjudicate on such a violation. Although it was firmly enshrined in international law that no reservation could be made to a peremptory norm, the principle of consent as framed in draft conclusion 14 (2) could give States total freedom to reject the jurisdiction of the Court, even in the absence of a formal reservation. It would be advisable for the Commission to contextualize the meaning and scope of the principle of consent to jurisdiction if it wanted peremptory norms to preserve their true nature, as norms from which no derogation was permitted by any means.

In view of the points that he had made, he proposed that draft conclusion 14 (2) should read: "The fact that a dispute involves a peremptory norm of general international law (*jus cogens*) is sufficient to establish, *prima facie*, the jurisdiction of the Court." [*Le fait qu'un différend mette en cause une norme impérative du droit international général (jus cogens), suffit à établir, prima facie, la compétence de la Cour.*] The wording implied that jurisdiction could be established even without the consent of the parties. The words "in accordance with international law" at the end of the sentence proposed by the Special Rapporteur could be deleted as they did not facilitate the comprehension of the draft conclusion as a whole.

Regarding draft conclusion 15 (1), in the French version, he would replace the words "*si elle serait en conflit*" with "*si elle est en conflit*". Remaining in the French text, in draft conclusion 15 (3), it would be more accurate to refer to the persistent objector rule as a "*principe*" ("principle") than as a "*doctrine*" ("doctrine"), given that the term "*principe juridique*" ("legal principle") was more far-reaching in scope than "*doctrine*", which denoted a broad, changeable and vague concept.

Although draft conclusion 18 was satisfactory as it stood, it might be improved by conveying the idea that the breaches referred to therein could be cited or raised by all States, insofar as they related to obligations *erga omnes*.

Draft conclusions 20, 21 and 22 were, to a large extent, well drafted. They could, however, be grouped together into a single draft conclusion comprised of various paragraphs dealing generally with cooperation and, more specifically, with issues related to assistance and the competence of States to establish their jurisdiction over breaches of peremptory norms of general international law.

The two paragraphs of draft conclusion 23 reflected their purpose, namely to prevent a State official who had committed an offence prohibited by a peremptory norm of general international law from using his or her official position as an argument or form of protection against foreign criminal jurisdiction. However, he agreed with Mr. Nolte that the reasoning in the report was incomplete, in that it addressed only immunity *ratione materiae*. What about immunity *ratione personae* when an official had committed an offence prohibited by a peremptory norm of general international law?

The relationship between immunity *ratione personae* and *jus cogens* could not be ignored as, for various reasons, offences prohibited by peremptory norms of general international law were sometimes prosecuted and proved long after their commission, when the perpetrator no longer held an official position. In the interests of consistency with the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction", a paragraph should be inserted on immunity *ratione personae*.

He continued to believe in the usefulness of drawing up an indicative, open-ended list of *jus cogens* norms, as doing so would help to strengthen the recognition of such norms in law as and when relevant cases were brought before international courts. The fact that *jus cogens* norms were dynamic and evolved over time should not hamper the development of a more structuring legal framework to facilitate the progressive framing of *jus cogens* norms. To draw an analogy with the law of maritime delimitation, the main principles of that law had not been defined once and for all in the 1969 *North Sea Continental Shelf* cases. Rather, international courts had developed the law progressively, in a more structured way, as and when disputes had been brought before them. The Commission had to begin somewhere, and an indicative list seemed as good a place as any. Disputes involving *jus cogens* could follow the same path as maritime delimitation disputes, provided that the Commission resolved to take the lead on the matter.

The consideration of regional *jus cogens* was of the utmost importance. Regional *jus cogens* well and truly existed in international law and should be dealt with accordingly, without being viewed systematically as a factor liable to contribute to the fragmentation of international law. How could it not exist when the Charter of the United Nations itself delegated to regional frameworks the resolution of certain conflicts that threatened international security? Regional *jus cogens* and universal *jus cogens* were two sides of the same coin, their purpose being to preserve the core values of the community of nations.

On the basis of his earlier comments, he recommended that all the draft conclusions should be referred to the Drafting Committee.

Mr. Grossman Guiloff said that he wished to thank the Special Rapporteur for the detailed and extensive work that had gone into his third report, which covered the most difficult aspects of the topic, including the legal consequences of *jus cogens*.

In the theoretical debates on *jus cogens*, there was a clash between two important concepts. The first was the need for stable international relations based on observance of the principle of *pacta sunt servanda*, which was an important concept, since State sovereignty and the need for stable international relations could not be taken lightly. The second concept concerned the acceptance of the proposition that there were commonly shared values of such importance that the international community rejected behaviour that violated those values. The very notion of "international community" required the acceptance of some values and the exclusion — deemed essential by the international community as a whole — of some forms of conduct.

The two concepts had been reconciled firstly by a requirement that the commonly shared values should be agreed upon by the international community as a whole and secondly through the fulfilment of procedural requirements when a claim was submitted in relation to a breach of those values. The Vienna Convention on the Law of Treaties was the most authoritative normative arrangement to reconcile the two concepts. Accordingly, for the most part, the issues covered in the report arose for States that had not ratified the Vienna Convention or had made reservations that had repercussions with regard to peremptory norms and, in particular, mechanisms for the settlement of disputes. Following that line of thought, the problem was whether and to what extent the Vienna Convention codified or had become customary international law. In terms of the procedural components, it could not be affirmed that all of them had achieved the status of customary international law. Unfortunately, State practice in that regard was limited. That being said, the need to strike a balance, the need for reconciliation with the concept of *pacta sunt servanda* and the need for commonly shared values had been recognized by the international community. On the basis of that recognition, it could be argued persuasively, through the use of deductive reasoning, that some obligations of a procedural nature could be established, including, at the very least, the obligation to negotiate in good faith. It was also important to understand that, because of the nature of *jus cogens*, there was a need for consequences to flow from *jus cogens* norms, because otherwise, everything would be empty rhetoric, which would affect the legitimacy of the rule of law and the idea that law regulated conduct. In that respect, it was important to take into account the reasoning of the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, in which it had sustained that "articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith". Also relevant in that regard was Article 2 (3) of the Charter of the United Nations, which established that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".

As stated by numerous speakers before him, in analysing each of the draft conclusions presented by the Special Rapporteur, the Commission would be on safe ground so long as it adhered closely to the Vienna Convention, the law of State responsibility and other important contributions that it had made in the past.

As mentioned by Mr. Murphy, among others, it was important to strike a balance in the draft conclusions by following the provisions of the Vienna Convention. Consequently, it would be interesting to hear how efforts to achieve that balance were affected by the merging of the concepts of "termination" and "invalidity" of a treaty, bearing in mind that the title of draft conclusion 10 referred only to invalidity.

As to the interpretation of a treaty provision, there were two possible options. The first, reflected in draft conclusion 10 (3), was to interpret the provision in a manner that rendered it consistent with a peremptory norm of general international law. The second was to interpret it in a way that strictly avoided conflict with a peremptory norm of general

international law. He wondered whether it was possible to formulate a general rule that favoured one interpretation over the other, and whether the Commission should not consider looking at the particular *jus cogens* norm involved. For example, it was generally accepted in the jurisprudence of regional courts and the International Court of Justice that, when interpreting human rights treaties, the humanitarian purpose of those treaties had to be taken into account. Accordingly, should States be given more or less discretion with regard to interpretation when a *jus cogens* human rights norm was involved?

He agreed with previous speakers who had raised the issue of the placement of draft conclusion 12, which dealt with the consequences that arose once it had been established that a treaty was invalid or had terminated. The placement of the draft conclusion would have an impact on the balance of the draft conclusions as a whole.

He generally agreed with draft conclusion 13. The issues arising from it, if any, could be dealt with by the Drafting Committee.

Concerning draft conclusion 14, he shared the Special Rapporteur's desire to recommend procedures regarding peaceful settlement of disputes involving conflict between a treaty and a peremptory norm of general international law. In his view, however, the Commission needed to preserve the voluntary nature of jurisdiction. Moreover, the recommendation to resort only to the International Court of Justice seemed too narrow. There were, after all, other forms of peaceful settlement of disputes. He had listened with interest to the comments of Mr. Reinisch regarding the danger of fragmentation of international law should the Commission include arbitration among those forms, but the international legal community had ways of reacting to hypothetical decisions or agreements that would have an impact on peremptory norms, and there was value in the argument that the Commission should not recommend the referral of every dispute to the International Court of Justice. As he had mentioned before, the issues covered in the report did not arise for States that had ratified the Vienna Convention and had not made reservations to the dispute settlement clause contained therein. The issues did not arise, either, for States that had ratified treaties that included a compromissory clause concerning resort to the International Court of Justice, such as the American Treaty on Pacific Settlement. It might be interesting to compile an inventory of such treaties and the States bound by them, as doing so would allow the Commission to assess the scope of the issue, in relation to which there was limited State practice.

He agreed with Mr. Murphy and other speakers that the Special Rapporteur needed to include general principles of law under the section of his report concerning the consequences of peremptory norms for other sources of international law. Although it was highly unlikely that a general principle would conflict with a peremptory norm, in the interests of consistency, general principles should be included. He agreed, by and large, with the Special Rapporteur's reasoning behind draft conclusion 15.

Concerning draft conclusion 15 (1), he believed that a customary international law rule did not arise if it conflicted with a peremptory norm of general international law. The same was true for general principles and other sources of law, because of the nature of *jus cogens* and because *jus cogens* norms were the result of complex processes. He was of the opinion that, *ab initio*, the Commission should consider that any manifestation, behaviour or statement that conflicted with a peremptory norm did not give rise to a rule of international law.

Regarding draft conclusion 16, he agreed with previous speakers who had called for the term "unilateral act" to be explained in the commentary.

International organizations, by virtue of their international legal personality, were also bound by peremptory norms of general international law. Accordingly, a draft conclusion on the consequences of such norms for international organizations was justified. Needless to say, those consequences were not restricted to the adoption of binding resolutions, but should extend to the duty of non-recognition and all the other legal consequences arising from *jus cogens*. That should be made clearer in the text of the draft conclusions and in the commentaries thereto. Specifically regarding draft conclusion 17, he agreed that the resolutions of organs of international organizations, without exception, must be consistent with *jus cogens* norms. However, like other members, he wondered whether

the Security Council should be singled out in the draft conclusion. He was not convinced by the arguments put forward by the Special Rapporteur in his third report regarding, *inter alia*, the primacy of Security Council resolutions over other rules. In any case, the more complex challenges arose not when the Security Council chose to act, but rather when it did not act. He proposed the inclusion of a statement in the commentary to the effect that compliance with *jus cogens* norms applied to all organs of international organizations. He supported the inclusion of a general draft conclusion explicitly covering all the legal consequences of peremptory norms for international organizations and the provision of further explanation in the commentary.

He agreed that it was appropriate to refer to *erga omnes* obligations in the context of draft conclusion 18 and that the language thereof should closely reflect that of article 48 (1) of the articles on State responsibility for internationally wrongful acts. Those same articles should serve as a model also for draft conclusion 20; any departure from the articles on State responsibility should be explained by the Special Rapporteur.

He supported draft conclusions 22 and 23, as the prohibition of international offences necessarily entailed the obligation to prevent such offences and to punish those responsible for committing them, in line with the principles that followed from the Nuremberg trials and such instruments as the Convention on the Prevention and Punishment of the Crime of Genocide. However, he took issue with the formulation of draft conclusion 22 (1), because it excluded the principle of passive nationality and conflicts of jurisdiction, which should at the very least be addressed in the commentary. Paragraph 2 of draft conclusion 22, as it stood, did not require the exercise of domestic jurisdiction in accordance with international law; he proposed that it should be redrafted to include such a requirement, given the risk of misuse of national jurisdiction.

He agreed that immunity *ratione materiae* should be addressed explicitly in the draft conclusions on the topic at hand, given the many instances of international offences that were committed by persons acting in official positions. However, the immunity of such persons should not be a ground for excluding responsibility. In any event, the Commission should strive for consistency with its work on the topic "Immunity of State officials from foreign criminal jurisdiction" and, accordingly, should refer draft conclusions 22 and 23 to the Drafting Committee and continue its work on the current topic only once draft article 7 of the topic of immunity of State officials had been adopted on first reading.

He agreed with the statement made by other members that commentaries constituted an essential part of the Commission's work, by providing opportunities for constructive, interactive dialogue with the Sixth Committee. While acknowledging the difficulties involved in drawing up an illustrative list of *jus cogens* norms — which should also specify the criteria for inclusion in the list — he was of the view that a list would be useful, in the light of some States' reactions to the topic thus far.

In conclusion, he was in favour of referring all the draft conclusions to the Drafting Committee.

Mr. Jalloh said that he had found the Special Rapporteur's reasons for including a reference to Security Council resolutions, as set out in paragraph 150 of his third report, sufficiently persuasive. It was, in his view, uncontroversial that no one was above the law and that, therefore, the resolutions of the Security Council were subject to the same rules as any other international organization, as set out in draft conclusion 17. It would be helpful if those members who felt that the reference, in the draft conclusion, to Security Council resolutions was "inappropriate" would substantiate their positions. As to Mr. Grossman's comments, it was true that the Security Council did not take action in many situations; however, when it did act, it must do so within the law.

Mr. Grossman Guiloff said that while it was ostensibly not the Special Rapporteur's intention, it appeared, from the current drafting of draft conclusion 17, that the Security Council might have committed acts in conflict with *jus cogens* norms and that it needed to be established that the Council was not above the law.

Mr. Hmoud said that he wished to commend the Special Rapporteur for his third report on peremptory norms of general international law (*jus cogens*), which, despite

dealing with the most difficult aspects of the topic, clearly identified the consequences of *jus cogens* norms for the law of State responsibility. It provided sufficient basis for the draft conclusions, in terms of practice and doctrine, in a manner that was consistent with the 1969 Vienna Convention on the Law of Treaties and other rules of general international law.

While some criticism had been expressed by certain Member States and members of the Commission regarding the fact that the Commission had not adopted those conclusions provisionally adopted by the Drafting Committee, there seemed to be general support for the Special Rapporteur's approach to the topic. He did not see the Commission's method of work on the topic as an impediment to its progress thereon or as negatively affecting the transparency of the Commission's work. Moreover, there seemed to be general support for the Special Rapporteur's approach. States had had the opportunity to react to the Special Rapporteur's reports at the meetings of the Sixth Committee; and, once adopted by the Commission, the draft conclusions and the commentaries thereto would be available for review before being adopted at the second reading stage.

The most challenging aspect of the topic under discussion was the lack of certainty in identifying the consequences of *jus cogens* norms beyond what was contained in articles 53 and 64 of the Vienna Convention. Both practice and judicial pronouncements were scarce in that regard and sources were mostly confined to the literature. Nonetheless, the Special Rapporteur's report sufficiently identified key consequences based on rules in the Vienna Convention, as well as derivatives of the application of the general rules of international law relating to *jus cogens*. That was sufficient to establish the Commission's work on the basis of *lex lata*, although there might be certain conclusions that were more suitable in the context of *lex ferenda*. That would not undermine the Commission's work on the topic so long as there were solid grounds for the adoption of the draft conclusions. The fact that the draft conclusions on consequences mainly derived from two areas of law — treaty law and the law of State responsibility — made the process of identification more attainable. He did not see a reason why the Commission should not include the consequences relating to areas other than treaty law and State responsibility. If such conclusions were either well established as rules or were emerging rules in other areas of law, there was no reason why the Commission should refrain from discussing them under the current topic and, if appropriate, adopt related conclusions.

Recalling that he and a number of other members of the Commission had argued, at an earlier session, that the characteristics and consequences of *jus cogens* norms were heavily intertwined and had thus preferred delaying discussion of the relevant draft conclusion until the Special Rapporteur had analysed the issue of consequences and legal effects of *jus cogens* norms, he said that draft conclusion 2 could now be seen as buttressing the conclusions proposed on the consequences in all the areas identified by the Special Rapporteur.

The invalidity of a treaty was well established as a key consequence relating to *jus cogens* norms, as set out in articles 53 and 64 of the Vienna Convention. However, there was hardly any practice that attested to the extent of invalidity beyond the doctrinal propositions. He was not aware of any instance where an international court had invalidated a whole treaty by virtue of a conflict of any of its provisions with the rules of *jus cogens*, nor of any instance where States had invoked any procedure under articles 65 or 66 of the Vienna Convention or under the relevant treaty regime in order to invalidate a treaty on the basis of a conflict with *jus cogens*. While that should not undermine the content of the rule on invalidity, it was important that the Commission should identify its applicability and the means to put it into effect without threatening the stability of treaty relations. Such matters were related closely to the issue of implementation of international law, but it was important to take into account the need to protect the stability of treaty relations and not to open the door to endless claims of invalidity on the basis of a conflict with *jus cogens* norms. As had been mentioned earlier, international courts had refrained from declaring treaties invalid for good reason and the Commission should be cautious in its approach to the issue, taking into account the tendency towards political advocacy in relation to the implementation of *jus cogens* rules.

While the ordinary meaning of the phrase "in conflict with *jus cogens*" under articles 53 and 64 of the Vienna Convention might be clear, implementation of those articles could

prove difficult. For example, if a treaty allowed for the use of force in the context of collective self-defence but allowed for various interpretations of self-defence beyond its accepted scope, he wondered if that treaty would be considered void or voidable. There were a number of examples of *jus cogens* rules, especially relating to the use of force, human rights and international humanitarian law, in which the principle of *pacta sunt servanda* could be affected if the term "in conflict with" was not clearly interpreted. Further discussion of the matter might be warranted.

He agreed with the Special Rapporteur that article 53 of the Vienna Convention did not allow for severing provisions in conflict with *jus cogens* norms from the treaty itself, thus making the whole treaty invalid. The *travaux préparatoires* for that article made it clear that the intent had been to reach that conclusion and that no subsequent practice existed to suggest that there was a departure from that interpretation. However, as there was no practice of invalidating whole treaties by virtue of a conflict with *jus cogens* norms, the rules of interpretation should be used to determine whether a given treaty rule conflicted with a *jus cogens* norm, with emphasis being placed on the need to interpret, as far as possible, the treaty in a manner consistent with the relevant rule of *jus cogens*.

In the same way, article 64 of the Vienna Convention on the Law of Treaties left the door open for severability and while there was no legal logic for the distinction in treatment between an existing conflict under article 53 and an emerging conflict in article 64, the Commission could not restrict the text of article 64. Therefore, the severability of provisions must be maintained. He agreed, furthermore, that the conditions set out in article 44 of the Vienna Convention were applicable to severability by virtue of article 64 as the former was general in its application to all the sources of invalidity contained in part V of the 1969 Vienna Convention.

Draft conclusion 12, which reflected article 71 (1) and (2) of the Vienna Convention, should be maintained. While he agreed with the Special Rapporteur that consequences of acts performed in reliance on a provision of a treaty that was not in conflict with existing *jus cogens* norms should not be affected, he doubted that the consequence itself could then produce legal effects.

On the procedure for invalidating treaties on account of a conflict with a *jus cogens* norm, the Commission should take a cautious approach in seeking to prevent abuses while taking into account the benefits of establishing such a procedure. If the Commission were to go beyond the conditions contained in article 64 of the Vienna Convention, it might be prudent to provide first for other means of dispute settlement before submission to the International Court of Justice. While that was clearly intended as a way to avoid fragmentation regarding the crucial issue of invalidating a treaty owing to a conflict with a *jus cogens* norm, the Commission should nonetheless make it clear that the International Court of Justice should be a last resort. As highlighted in the report, the possibility of claims of unilateral acts of invalidity remained remote. As such, he did not have strong views on whether to include a procedure for disputes involving treaty invalidation owing to a conflict with a norm of *jus cogens*.

Treaties should, as far as possible, be interpreted in a manner that avoided conflict with *jus cogens* norms; that was reflected, at least partially, in article 31 (3) of the Vienna Convention. In any case, the rules of interpretation contained in articles 31 and 32 of the Vienna Convention should be applied and the language in draft conclusion 10 (3) was appropriate in that it did not attempt to redefine the Vienna interpretation rules. The superior nature of *jus cogens* norms necessarily meant that rules of *jus cogens* would play a primary role in the interpretation of a given treaty, as already demonstrated in a number of cases.

In setting out the effects of *jus cogens* norms on reservations to treaties in the Guide to Practice on Reservations to Treaties, the Commission had not provided that a reservation that conflicted with a *jus cogens* norm was impermissible; however, the content of guideline 4.4.3 was clear in making such a reservation null and void by not allowing it to modify the treaty or its legal effects in line with the relevant articles on impermissible reservations of the Vienna Convention. He therefore supported draft conclusion 13.

He appreciated the Special Rapporteur's analysis of the consequences of *jus cogens* in relation to State responsibility and the draft conclusions proposed in regard thereto. As for the question of whether the Commission should go beyond what was provided for in the articles on State responsibility in terms of the applicability of such consequences only to serious breaches of *jus cogens* norms or whether it should extend such consequences to all breaches, he noted that, in the commentaries to the articles on State responsibility, the duty of cooperation had not, at that time, been considered *lex lata*, but rather an emerging rule. Now that the principle was clearly recognized in practice and court rulings, it was clear that the duty of cooperation to end serious breaches was *lex lata*. He did not see why the Commission should not propose as *lex ferenda* consequences that might eventually develop into *lex lata*. Furthermore, where there was a strong legal basis and policy for confining the duty to cooperate to end serious breaches of *jus cogens* norms, the same was not true regarding the duty not to recognize and the duty not to render assistance to a breach. In other words, it was unconscionable to provide that a State should be allowed to recognize and render assistance to a breach of a norm of *jus cogens* or even a less serious breach. There was no practice or judicial decisions that allowed international subjects to do so. While the articles on State responsibility reflected a compromise or, more precisely, a consensus rule, they did not exclude the possibility of special consequences arising from normal, non-serious breaches of *jus cogens*.

Regarding the role of international organizations as subjects of international law in respect of breaches of *jus cogens* norms, both the Commission's articles on responsibility of international organizations and judicial practice, including the advisory opinion of the International Court of Justice on the *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory*, confirmed that international organizations had obligations in relation to serious breaches of *jus cogens* norms. Therefore, in the same way as for States, the draft conclusions should provide for the duty of international organizations to cooperate to end serious breaches and, in relation to all breaches of *jus cogens* norms, not to recognize as lawful a situation created by a breach of a *jus cogens* norm or render assistance in the maintenance of such a situation.

He supported draft conclusion 18, noting that if the Commission were to restrict the possibility that *jus cogens* rules had *erga omnes* effects in terms of giving rise to relevant obligations, then it would restrict the implementation of *jus cogens* norms. The report did not cover the content of obligations *erga omnes* beyond serious breaches of *jus cogens* norms; while taking into account the case law of the International Court of Justice, it might be advisable to identify both the character of the *erga omnes* effect of *jus cogens* norms and the *erga omnes* obligations that also reflected norms of *jus cogens*. He noted that the Commission had refrained from doing the latter in its work on the topic of State responsibility.

The consequences of *jus cogens* norms for resolutions of international organizations was an important, practical matter, especially for those who followed the work of the Security Council. After the Cold War, there had been a balance of power within the Security Council, so that resolutions were adopted by consensus; later, however, the legality of Security Council resolutions had come into question, as had the issue of the potentially *ultra vires* acts of the Council. The debate around the matter continued, including with reference to violations of *jus cogens* norms. He was not convinced that the Commission should avoid the issue of the binding resolutions of international organizations. They were acts of subjects of international law that were bound by the rules of *jus cogens* and required to implement their consequences, as recognized by both the International Court of Justice and the Commission in its articles on responsibility of international organizations. In light of that, and taking into account the hierarchy of rules that placed *jus cogens* norms above any other treaty obligations, draft conclusion 17 should reflect that the binding resolutions of international organizations were inferior to *jus cogens* norms. While he appreciated the arguments regarding Article 103 of the Charter of the United Nations and the character of Security Council resolutions under the Charter, there was hardly any support for the proposition that Security Council resolutions could violate *jus cogens* norms. The issue of the conventional hierarchal similarity between *jus cogens* norms and Article 103 of the Charter stopped there. *Jus cogens* norms trumped all other sources, not only treaty obligations. Having said that, he did not see the need to single out Security Council

resolutions in draft conclusion 17, for the same reasons already mentioned by other members of the Commission. Instead, the issue of the binding nature of *jus cogens* norms and their superiority over Security Council resolutions could be discussed in the commentaries, as might other matters, such as sanctions.

It was possible that a unilateral act might bind its author if it was a legal act, but its value beyond that legal effect was doubtful. While such unilateral acts might violate *jus cogens* norms and therefore be a source of responsibility, in addition to creating other consequences, it was not clear that its effects could be confined to the invalidity of the act. Therefore, draft conclusion 16 should also be stated as being without prejudice to other effects of the act that might arise as a result of a violation of a *jus cogens* rule.

He supported draft conclusion 15 regarding both the invalidity of a conflicting rule of customary international law and the inapplicability of the persistent objector doctrine. Nonetheless, the first aspect should be further qualified in order to cover the issue of termination or modification of a *jus cogens* rule by a subsequent *jus cogens* rule having the same character, as envisaged in the last sentence of article 53 of the Vienna Convention. If a conflicting rule of customary international law were not allowed to evolve because it conflicted with a rule of *jus cogens* arising from customary international law, it would be impossible to terminate or modify that rule in any way. That issue should be discussed in the Drafting Committee or in future reports of the Special Rapporteur.

On other consequences in relation to individual criminal responsibility in international law, he agreed that there was sufficient practice to establish a rule on the national criminalization of crimes prohibited by *jus cogens* norms. The fact that territorial or personal jurisdiction existed in all States for crimes that were, in their simple form, elements of crimes prohibited by *jus cogens* norms provided a basis for the inclusion of a rule on territorial and personal jurisdiction over crimes prohibited by *jus cogens* norms, such as that set out in draft conclusion 22.

He agreed that individual responsibility existed under international law for crimes prohibited by *jus cogens* norms and that immunity *ratione materiae* did not exist for such crimes. Nevertheless, he agreed with other members of the Commission that the issue should be deferred for the current topic until the relevant article had been adopted in the context of the topic of immunity of State officials from foreign criminal jurisdiction, notwithstanding the convincing arguments made by the Special Rapporteur in favour of dealing with the issue within the context of *jus cogens* norms.

He supported the inclusion of a non-exhaustive list of *jus cogens* rules for the benefit of the Commission's work and of the international community. He recommended referring all the draft conclusions in the Special Rapporteur's third report to the Drafting Committee.

Mr. Jalloh said that he would welcome further comments from Mr. Hmoud in relation to the way that Security Council resolutions were addressed in the report. Referring to paragraphs 150 to 154 of the report, he said that the Special Rapporteur had presented the reasoning, and described the support expressed by both States and international tribunals, for the view that Security Council resolutions must comply with the peremptory norms of general international law. However, the colleagues who opposed that view had not offered any substantive reasons for doing so. Given the significance of the issue, reasons must be put forward if there was a general wish to rebut the Special Rapporteur's position. While, as Mr. Grossman Guiloff had said, there had certainly been instances of inaction by the international community in the past, the most significant being the case of Rwanda in 1994, if Security Council resolutions did lead to action, that action must clearly be within the law.

The Chair suggested that a mini-debate could be held on the question at the next meeting.

Mr. Al-Marri said that he wished to congratulate the Special Rapporteur on the quality of the report, the first 19 paragraphs of which provided a good summary of the issues involved. Article 53 of the Vienna Convention on the Law of Treaties established peremptory norms as norms that could not be derogated from in international treaties. The principle of peremptory norms was guided by the same objectives in international law as those guiding public law at the national level.

The context in which the Vienna Convention had been adopted in 1969 was very important and had to be taken into account in any subsequent work on peremptory norms. Ensuring that legislation was in line with internationally accepted standards had been at the forefront of concerns in the 40 years following the establishment of the United Nations. At that time, the international community had included a large number of newly independent States and, therefore, great emphasis had been placed on prohibiting the use of violence to pursue national interests, banning occupation and racial or ethnic discrimination and stressing that a nation should have sovereignty over its own natural resources. Outer space and the ocean floor had been considered as assets shared by all of humankind, and the prohibition of torture had become non-derogable.

In developing the articles on responsibility of States for internationally wrongful acts, the Commission had addressed the concept of "international crime", the prevention, prohibition and punishment of which was the shared responsibility of the international community as a whole, as opposed to violations that one State might against another in the field of diplomatic relations. The core aspect of such wrongful actions was that they should be of concern to the entire international community and, from there, the idea of peremptory norms of international law had taken shape.

That had been followed by a maturing of the idea of *jus cogens*, as reflected in the fifth paragraph of the commentary to article 26 on the responsibility of States for internationally wrongful acts, adopted in 2001. The report considered a number of the points raised therein and so provided guidance to aid the Commission's reflection on the legal implications arising from *jus cogens*. The Commission's task was an important one and the challenge before it lay in the scarcity of relevant practice. Many of the draft conclusions proposed derived from the law of treaties, the responsibilities of States and individual criminal responsibility. The comments that had already been made provided a good basis for adopting a body of recommendations in the near future.

Cooperation with other bodies (agenda item 14)

Visit by the representative of the Inter-American Juridical Committee

The Chair welcomed Mr. Salinas Burgos, of the Inter-American Juridical Committee, and invited him to address the Commission.

Mr. Salinas Burgos (Chairman of the Inter-American Juridical Committee) said that the Inter-American Juridical Committee, as one of the principal organs of the Organization of American States (OAS), served as an advisory body to OAS on juridical matters, promoted the progressive development and the codification of international law, studied juridical problems related to integration and sought to harmonize the legislation of the different member States, bearing in mind their various legal systems and traditions. It was composed of 11 national jurists from the OAS member States, who were elected by the General Assembly.

The Committee had held two regular sessions in 2017, at which it had adopted two reports, one on the conscious and effective regulation of business in the area of human rights, and the other on cultural heritage assets. It had also issued a statement on immunity of States and statelessness.

On the conscious and effective regulation of business, the Committee had compiled best practices, legislation and case law in that area and proposed options for moving forward with such regulation, including the proposed guidelines concerning corporate social responsibility in the area of human rights and environment in the Americas that the Committee had adopted in 2014.

The Committee's report on the protection of cultural heritage assets included an analysis of regional and universal legal instruments on that topic, proposals for further developing national implementing legislation and recommendations on inter-State cooperation mechanisms for facilitating regional implementation of those instruments, in particular the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations

(Convention of San Salvador). It also put forward a suggestion that a user's guide should be developed for the implementation of both treaties and soft-law instruments, including strategies for the recovery and restitution of cultural heritage assets, which were part of the region's identity.

The inclusion of the Committee's reports in resolutions of the OAS General Assembly demonstrated the member States' interest in following up on the issues for which the Committee had been given a mandate. The Committee had competence for private as well as public international law, and one of the resolutions adopted called on it to ensure the broad dissemination of the Model Act on the Simplified Stock Corporation, which provided for a hybrid form of corporate organization that made the incorporation of small businesses and microenterprises less costly and cumbersome, thus helping to promote economic and social development in the member States.

The General Assembly had also considered the Model Inter-American Law on Access to Public Information and requested the General Secretariat to promote its implementation and to identify thematic areas that could be updated or broadened and to forward its findings to the Committee. In June 2017, the Assembly had taken note of the Committee's report on human rights and business which, in line with the mandate from the General Assembly, had then been included in the February 2018 working session of the Committee on Juridical and Political Affairs.

During the period under review, the Committee, which could be mandated by the General Assembly to address topics, but could also decide on its own initiative to place topics on its agenda, had also approved the consideration of two new topics: the validity of foreign judicial decisions in light of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards; and binding and non-binding agreements, including the important issue of their legal nature. The latter had arisen from discussions with foreign ministry legal experts in October 2016. The Juridical Committee, meeting in plenary session, had also decided to maintain the following topics on its agenda: immunity of international organizations, the law applicable to international contracts, the strengthening of representative democracy, including the Inter-American Democratic Charter, and application of the principle of conventionality.

The Committee had held its forty-fourth Course on International Law in Rio de Janeiro, Brazil, from 31 July to 18 August 2017. The Course had been attended by 42 participants, 15 of whom had been awarded OAS scholarships. The lecturers for the course had included a member of the Commission, Mr. Vázquez-Bermúdez. Another Commission member, Mr. Grossman Guiloff, would be among the lecturers at the next course, which was due to take place in August 2018. The Committee had also held meetings with representatives of the African Union Commission on International Law and with the Executive Secretary of the Inter-American Commission on Human Rights.

The Committee had held its ninety-second regular session in Mexico City from 26 February to 2 March 2018, during which its activities had included meetings with high-level Mexican officials, including representatives of the Ministry of Foreign Affairs, the Office of the Attorney General of the Republic and the Ministry of the Interior.

During its ninety-third regular session, to be held in Rio de Janeiro in August 2018, the Committee would meet with representatives of the Hague Conference on Private International Law. It would also hold a meeting with legal advisers from the ministries of foreign affairs of a number of member States with a view to continuing discussions initiated two years previously on such topics as immunity, international trade and consumer rights. The Committee would welcome the presence of a member of the Commission at that event.

The Chair said that the Commission appreciated the update on the Committee's work. He noted that four young Latin American jurists were among the 25 participants of the International Law Seminar being held in Geneva.

Mr. Vázquez-Bermúdez said that it had been a great honour for him to visit the Committee in 2017. He would be interested to hear about the progress the Committee had made in its consideration of the topic of binding and non-binding agreements. It was sometimes difficult to distinguish between legally binding agreements and commitments

that were purely political in nature. For example, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, the International Court of Justice had ruled that the parties had concluded a legally binding agreement, despite the assertion of the Foreign Minister of Bahrain that it had not been his intention to subscribe to such an agreement.

Mr. Grossman Guiloff, noting that the topics taken up by the Committee addressed a broad range of issues of interest to society at large, said that it would be interesting to know what selection criteria were used in that connection.

Mr. Ruda Santolaria said that he would be particularly interested to know about the feedback that member States had provided, through the Committee's regular meetings with legal advisers, regarding the topics it had decided to take up and how that feedback had subsequently been taken into account in developing the Committee's activities.

Mr. Nolte said that he would be interested to know whether the Committee had a relationship with the Inter-American Court of Human Rights and how it addressed questions arising from judgments of the Court, including with respect to legislative implementation and interpretation.

Mr. Gómez-Robledo said that it would be useful to hear about the background to the topic of representative democracy and reform of the Inter-American Democratic Charter. Given that contemporary attacks on democracy differed in nature from those that had occurred during the 1970s and 1980s and which the Charter had been intended to address, he asked whether the Committee was working towards presenting proposals for reform of the Charter to the OAS General Assembly.

Mr. Salinas Burgos (Chairman of the Inter-American Juridical Committee) said that the Committee was intending to develop guidelines on distinguishing between legal and political agreements. The Rapporteur for the topic had drafted a preliminary report, which would be discussed in August 2018.

When selecting topics to be taken up, the Committee's principal aim was to ensure that its work would serve the practical needs of the legal community in the Americas. It was also important to consider topics that were relevant throughout the region and to avoid duplicating the work of other bodies, including the Commission. Further considerations included the harmonization of legislation in the inter-American system, given the coexistence of continental and common law traditions in the region.

Although the Inter-American Court of Human Rights was not an OAS organ, the Committee maintained an important relationship with it. While remaining mindful not to duplicate the work of the Inter-American Commission on Human Rights, the Committee did take up topics relating to human rights. It was in the process of considering the principle of conventionality, which addressed the effects of judgments issued by the Inter-American Court of Human Rights on national law and courts in member States. The topic was a controversial one, with opinions polarized over whether judgments applied only to the case and State in question or should be integrated into the national legal system.

With regard to the Inter-American Democratic Charter, the aim was to strengthen the Charter without modifying it. Given that the Charter was a balanced instrument that had resulted from careful negotiations, modifying it could be counterproductive to the defence and preservation of democratic values in the region. The Committee's work on the topic was intended to strengthen the role of the Secretary-General in defending democracy. The main weakness of the Charter was that it lacked preventive tools such as early-warning mechanisms and reporting systems. The possibility was being explored of establishing a unit to defend representative democracy that would operate along the lines of the one in place to protect human rights. The topic was both complex and controversial; in the inter-American system, the principle of non-intervention was sacrosanct.

The meeting rose at 1.05 p.m.